IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Arb. Case. No.11 of 2006

Judgment reserved on 11.12.2006

Date of decision 10.1.2007

Naresh Kumar Sharma Petitioner

Versus

State of H.P. and another. Respondents

Coram:

The Hon'ble Mr.Justice V.K.Ahuja, Judge.

Whether approved for reporting?[1]

For the Petitioner: Mr. Suneet Goel, Advocate.

For the Respondents: Mr.Ashutosh Burathoki,
Addl. Advocate General.

V.K.Ahuja,J.

This judgment shall dispose of the objections filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the Award dated 25.2.2006 made by the Arbitrator-cum-Superintending Engineer, Arbitration, HP, PWD, Solan.

Briefly stated the facts of the case are that the parties had entered into an agreement under which the petitioner/objector had agreed to execute the work of "Extension of Hockey and Football ground in Multi purpose ground at Luhnu Bilaspur (H.P.)". It was alleged by the petitioner that the work was duly executed by him to the satisfaction of the respondents and it was completed in December, 2000. However, the payments were not made and as dispute had arisen relating to the amounts claimed for the work done and the damages sustained, the petitioner involved the arbitration agreement and sought reference of the dispute to the arbitration. However, the Chief Engineer failed to appoint an

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[1] Whether reporter of local papers are allowed to see the judgment ?

Arbitrator and a request was made to the Hon'ble Chief Justice of High Court of Himachal Pradesh for appointing an Arbitrator. The said request was allowed in Arbitration Case No.14 of 2004 and the matter was referred to the sole arbitration of the Superintending Engineer, Arbitration Circle, HP PWD, Solan. Before the Arbitrator the petitioner preferred the following claims :

a	Payment for work measured	Rs.6,55,019/-
b	Payment for extraction and stacking of stone	Rs.3,15,000/-
c	Payment of watch and ward	Rs.2,95,200/-
d	Payment of unmeasured work	Rs. 50,000/-
e	Payment of interest @ 24% p.a. from 3/2001	

The respondents preferred a counter claim for arbitration expenses to an extent of Rs.50,000/-.

After conducting several hearings the Arbitrator Tribunal made an Award on 25.2.2006 and a copy of this award was received by the petitioner on 4.3.2006. The petitioner prayed for setting aside the award on the grounds that the award made by the Arbitrator is against law and facts. The objections were raised by the petitioner in regard to the following claims :-

i) That by making nil award against claim No.2 the Arbitrator has completely ignored the specification of the work and thus acted in conflict with public policy.

ii) That by making nil amount in respect of claim No. 3, the Tribunal acted in conflict with public policy of India since the petitioner was under no obligation to bear the watch and ward charges after the completion of the work.

iii) That the payment was to be made within six months of the completion of the work, but the same was not made, therefore the petitioner was entitled to the interest on the award amount.

Reply to the objections was filed by the respondents who pleaded that the award made by the arbitrator was not against the public policy. In

regard to the claims made on various grounds, the respondents pleaded as under :-

i) That claim No.2 was denied since the petitioner was required to stack boulder/stone properly under the terms of the agreement since it was a government property. However, these were not stacked properly and the findings recorded by the Arbitrator are based upon provisions of clause 10 and are not against public policy.

ii) In regard to claim No. 3 it was pleaded that the arbitrator on the basis of the evidence had concluded that the petitioner was not entitled to any amount.

iii) In regard to claim No. 4 it was submitted that the petitioner had himself withdrawn his claim on 24.11.2004 and as such no interest was payable. The petitioner had further volunteered to do the extra work and had agreed not to press for early payment of the work which payment was to be made after the receipt of the funds from the Deputy Commissioner, Bilaspur which amounts were paid to the petitioner as and when released by the Deputy Commissioner, Bilaspur and therefore no interest was payable.

Thus it was submitted that the objections are without any basis and are liable to be dismissed accordingly.

On the pleadings of the parties the following issues were framed :-

1. Whether the award dated 25th February,2006 passed by the Arbitrator is against the public policy of India and is liable to be set aside under the provisions of the Arbitration and Conciliation Act, 1996? OP-Objector

No oral evidence was led in support of this issue. The parties sought time to file affidavit by way of evidence. But no such affidavit was filed.

I have heard learned counsel for the parties and have gone through the record of the case. My findings on above issue is as under :

Issue No.1

The submissions made by Mr.Suneet Goel, learned counsel for the petitioner on different grounds were as under :-

(a) The petitioner submitted that he had claimed for excavation and stacking of the bounders/stones and has not made any claim for quantity. It was not disputed that these stones were the property of the government, which were excavated by the petitioner and as such he was entitled to the amount.

(b) In regard to the claim for payment of watch and ward of these stones, it was submitted that there was ample evidence on record to prove this claim of the petitioner and as such the petitioner was entitled to claim No. 3.

(c) In regard to claim No.5 it was submitted that the undertaking, if any, given by the petitioner was void and did not act as an estoppel and therefore the petitioner was entitled to the interest on delayed payments.

In reply learned Additional Advocate General appearing for the respondents has submitted that the material extracted was the property of the State Government and since no extra work was done by the petitioner and the material stacked had also been destroyed due to river since it was not properly stacked. It was also submitted that some limited quantity was found at the spot and the petitioner was not entitled to the said excavation work, which was within the terms of the agreement. In regard to claim No.3 made for labour, watch and award, it was submitted that the Muster Rolls as per rules were not given, payment sheets were not verified and since no extra person had been deployed after the work the petitioner was not entitled to any amount under this head. In regard to claim for interest it was submitted that the work was to be done on the basis of the funds to be released by the Deputy Commissioner, Bilaspur under a specific scheme. The petitioner was aware that this work was being done under a specific scheme, which work was done by the petitioner with specific

knowledge that the payment has to be released by the Deputy Commissioner, Bilaspur. The undertaking given by him was not against any statute but it was only in regard to the adjustment of payments and as such it was not against any public policy. Thus it was submitted that the objections made are frivolous have no merit in them and are liable to be rejected.

To substantiate his submissions, the learned Additional Advocate General has relied upon the following three decisions:

Puri Construction Pvt. Ltd. v. Union of India, AIR 1989 SC 777 shows that in considering the provisions of Sections 30 and 33 of Arbitration Act, 1940 (old Act), the following observations were made which are relevant and are re-produced:-

> "When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Act, and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits."

The decision in **Hindustan Construction Co. Ltd. vs. Governor of Orissa and others,** (1995) 3 SCC 8, shows that in considering the provisions of Sections 17, 39 and 30 of Arbitration Act, 1940 (old Act) it was held that escalation charges were awarded to the contractor and there was a dispute between the principal and the contractor as to the correctness of the same, both the parties relying on different documents, the award, held, could not be set aside by the High Court on the basis of re-appreciation of evidence in the said dispute. An award can be set-aside only on the ground specified in Section 30.

The decision in **Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.**, (2003) 5 SCC 705 shows that in reference to the provisions of Section 34(2)(b)(ii), Arbitration and Conciliation Act, 1996, it was held that the phrase "public policy of India" should be given a wider and not a narrower meaning. It was held that the court can set aside the award if it is given contrary to fundamental policy of Indian law, or the interest of India,

or justice or morality or is patently illegal or is so unfair and unreasonable that it shocks the conscience of the court. Further, illegality of a trivial nature can be ignored.

Coming to the provisions under which the award can be set aside, Section 30 of Arbitration Act, 1940 which provided the grounds for setting aside the award reads as under :

"30. Grounds for setting aside award.- An award shall not be set aside except on one or more of the following grounds, namely:

(a) that an arbitrator or umpire has mis conducted himself on the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Sec. 35;

(c) that an award has been improperly procured or is otherwise invalid."

Coming to the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 it reads as under :

"34. Application for setting aside arbitral award.- (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set-aside by the Court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may beset aside ; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or , failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India."

……."

It is clear that under the new Act the grounds, which are available to an objector, are limited. In the facts of the present case, the award has been challenged by the petitioner on the ground that it is in conflict with the public policy of India. This is the main ground taken by the petitioner on which the objection petition has been filed challenging the awards made under different provisions. A perusal of the award made by the arbitrator shows that in regard to claim No.2 as payment of extraction and stacking of stones for Rs.3.15 lacs, the arbitrator had observed that the respondents had relied upon the clause 10(d) of the agreement and the petitioner was advised by the Executive Engineer to properly stack the stones/boulders recovered from excavation in earth work and there is no such clause that for the material during the excavation the contractor is to be paid extra. Therefore nothing extra is payable to the contractor. In regard to the payment of watch and ward claim No.3 amounting to Rs.2,95,200/-, the arbitrator had referred to the evidence including the muster rolls and other documents produced by the petitioner and had concluded on the basis of the evidence that the claim was not sustainable. This is finding of fact recorded by the arbitrator based upon the perusal of the muster rolls, payment sheets and other evidence produced by the petitioner/contractor. The arbitrator was working as a judge and he had recorded the finding of fact based upon evidence and this court in deciding the objections cannot reappraise the evidence and cannot disagree with the conclusions drawn by the arbitrator on the basis of the evidence led

before him. In coming to the last claim in regard to the interest under claim No.5, it was observed by the arbitrator that there is no clause in the contract agreement for release of interest at the rate of 24% p.a. as submitted by the Executive Engineer. It was specifically observed that the funds for the execution of the work were to be provided by the Deputy Commissioner, Bilaspur. The reference was also made to an undertaking given by the petitioner vide his letter dated 27.12.2000 that the respondents will be at liberty to make his payment only after receiving funds from the Deputy Commissioner, Bilaspur. Therefore the claim was rejected, including the claim of the respondents for arbitration expenses amounting to Rs.50,000/-.

In regard to the above claim for interest it is clear that when a contractor takes work under a specific scheme and the funds are to be provided by some other agency though the work is to be executed through the Public Works Department through a contractor, it was quite apparent to the petitioner that the funds are coming under a specific scheme from another agency and he was quite aware of this fact and therefore gave an undertaking that the payment can be made to him only after receiving funds from the different agency i.e. the Deputy Commissioner, Bilaspur. The delay in question therefore was made since earlier no funds were made available by Deputy Commissioner, Bilaspur, and as and when the funds were received, the payment was made to the petitioner. There is no plea of the petitioner that even after the funds had been received there was considerable delay in making payments to him. In case the petitioner had voluntarily given an undertaking to bear with the department for delayed payments for the specific reasons that the funds are coming from another agency, it cannot be said that this undertaking was void being against any statute or against public policy.

Thus from the above discussion, it is clear that the arbitrator has made the award as a judge considering all evidence led before him and had given detailed reasons under different claims preferred before him,

the award made cannot be by any stretch of imagination said to be against public policy and the petitioner has failed to prove that this award was against public policy and had only taken objections in regard to appreciation of evidence etc. which objections are not tenable in the eye of law. I accordingly hold that the objections filed by the petitioner have no merit in it and are liable to be dismissed and accordingly the award made by the arbitrator is confirmed.

January 10,2007(g) **(V.K.Ahuja), J.**